the issue, "as presented to the Court of Appeals," was not. Br. in Opp. 16. But the issue below and the issue here are one and the same. The issue below was not "which facts [respondent would or would] not be able to prove at trial." 515 U.S. at 313. It was whether, "assuming [respondent]'s version of the facts is true—that [Gregory] procured [respondent]'s arrest" after concluding respondent was innocent "so that he could pressure [respondent] into providing information * * * —[Gregory] is still entitled to immunity because * * * a reasonable officer armed with *the facts*" before Gregory, including "an outstanding valid warrant for a suspect matching [respondent]'s name" and other "characteristics, could have believed [the arrest] to be lawful." Gov't C.A. Show Cause Br. 6-7. That was the issue the government briefed.[2] That was the issue respondent addressed.[3] And that was the issue the court of appeals resolved. Pet. App. 6a ("whether, assuming all conflicts in the evidence are resolved in [respondent's]'s favor, Gregory would be entitled to qualified immunity as a matter of law").[4]

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[2] Gov't C.A. Br. 21 (assuming Gregory believed that "the person named in the warrant was not" respondent, that "do[es] not state a violation of the Fourth Amendment in this case, because subjective intent has no role"); *id.* at 27 ("Supreme Court * * * precedent foreclose[s] an examination into an officer's subjective intent").

[3] Respondent characterized the issue as whether "a federal agent enjoy[s] qualified immunity * * * when he intentionally causes the arrest of a citizen he knows" to be innocent, Resp. C.A. Br. 1; addressed the argument that "the District Court erred by considering Agent Gregory's subjective intent," *id.* at 16; and urged that immunity requires "inquiry into the officer's mind," because an officer cannot arrest someone he believes (and thus "knows") to be "the wrong person," *ibid.*

[4] Respondent's sole basis for his contrary assertion is the government's "issue presented" in the court of appeals, which was whether "the district court erred in concluding that triable issues of material fact * * * preclude granting summary judgment * * * on * * * qualified immunity." Br. in Opp. 15-16. But that issue presented merely paraphrases the summary-judgment standard of Fed. R. Civ. P. 56, and asks whether summary judgment should have been granted. It does not ask whether the trial court erred in finding certain disputes to be "genuine," *i.e.*, supported by sufficient evidence on each side. See 515 U.S. at 319-320.

Finally, respondent urges that—although the petition "formally" presents an abstract "legal issue for review," Br. in Opp. 18, 19—there is no jurisdiction because he disagrees with the petition's characterization of certain facts. See Br. in Opp. 18-19. But the "Ninth Circuit did not identify any dispute about the evidence before Agent Gregory—*i.e.*, what [A]gent Gregory saw and heard," as respondent expressly concedes. Br. in Opp. 18 ("this is true"). Respondent, moreover, cites no case to support his claim that a party's purported factual disagreements can deprive a court of jurisdiction over a purely legal qualified immunity issue. The D.C. Circuit had "little trouble" disposing of precisely that contention in *Moore* v. *Hartman*, 388 F.3d 871, 875-876 (2004).[5] The same argument, moreover, was pressed in opposition to the government's petition for a writ of certiorari in *Moore*, Br. in Opp. 21-22, *Hartman* v. *Moore*, No. 04-1495 (May 27, 2005), and this Court granted review nonetheless, 125 S. Ct. 2977 (2005).

In any event, respondent's purported factual disputes are contrived. Respondent argues that the petition should not have asserted that "FBI records indicated that respondent's brother * * * *might* have used" respondent's name "as an alias" because "there is no 'might' in this evidence." Br. in Opp. 16. Characterizations aside, *the facts* are undisputed. At the time Gregory acted, he had before him "a July 1999 FBI bulletin which included 'Christopher Lee' in a list of five names and corresponding Social Security numbers used 'at various locations * * * by various individuals,' adding that '*it is not known* if [respondent's brother] Robert Lee is one of these individuals.'" Pet. 3 (quoting C.A. E.R. 71) (emphasis added). Moreover, even assuming Gregory had unassailable proof that *both* respondent and his brother had used respondent's name and identity, that evidence would not have precluded a reasonable officer from concluding that respondent rather than his

[5] So long as the district court's determinations are respected, "the solution to a disputed record on qualified immunity is the same as in any other summary judgment case"—the facts are viewed "in the light most favorable to the nonmoving party." *Moore*, 388 F.3d at 875-876.

brother had committed the crime described in the Florida warrant.

Indeed, at least one fact pointed decisively to respondent over his brother as the person wanted by Florida authorities—the Florida warrant did not mention scars or identifying marks, while every description of respondent's brother noted his extensive scars and tattoos. Br. in Opp. 17; Pet. 4, 13. Respondent nowhere denies that fact. Instead, respondent complains that, although Gregory "reviewed the warrant," C.A. E.R. 80, he did not *testify* that he relied on the warrant's omission of identifying marks. Br. in Opp. 17.[6] But that underscores the subjective nature of the tests respondent and the Ninth Circuit adopt. In their view, Fourth Amendment reasonableness and qualified immunity turn on the arresting officer's subjective mental processes—what he in fact took into account when he decided to act.[7] Whether the Ninth Circuit erred in adopting that test, or whether the First Circuit erred in rejecting it, *is* the question presented for review.

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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[6] Respondent also urges that "this 'decisive' fact was never presented" to the court of appeals "in any briefs nor in [the] petition for rehearing en banc." Br. in Opp. 17. Not so. See Gov't C.A. Reh'g Pet. 12 ("the Florida warrant * * * omitted any mention of scars, tattoos, or other identifying marks that characterized descriptions of plaintiff's brother").

[7] Respondent's extensive reliance on statements allegedly made by Gregory *after* respondent was arrested (Br. in Opp. 9-11) is likewise misplaced. The question here is whether Gregory violated respondent's rights (clearly established or otherwise) by *causing respondent's arrest*. See, *e.g.*, Pet. App. 6a (whether "clearly established law prohibited [Gregory] from executing a facially valid warrant"). What Gregory allegedly said after the arrest has no bearing on the facts before him when the arrest occurred. Instead, they bear on Gregory's *motive* for making the arrest—precisely the issue that *Harlow* excised from the qualified immunity inquiry. *Floyd*, 765 F.2d at 6. The statements that respondent quotes, moreover, are consistent with Gregory's position that he was offering to help respondent deal with Florida authorities on valid charges if respondent cooperated in locating his fugitive brother.

Respectfully submitted.

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JANUARY 25, 2006

No 05-344.

In the

Supreme Court of the United States

JAKE GREGORY,
Petitioner,

v.

JULIAN C. LEE,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, MARYLAND, MICHIGAN, OHIO, OKLAHOMA, TEXAS, UTAH, VERMONT, AND VIRGINIA, AND THE COMMONWEALTH OF PUERTO RICO AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether the lawfulness of a seizure under the Fourth Amendment, and the availability of qualified immunity, may turn on allegations that the officer subjectively inferred from the information before him - and thus "knew" - that the arrestee was innocent, without regard to whether, objectively assessed, the information supported probable cause or a reasonably competent officer could have so concluded. *See* Pet. at i.

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INTEREST OF AMICI

This is a case about qualified immunity, a doctrine designed to protect public officials against the burdens of civil litigation arising out of their on-the-job conduct. The amici States, whose officers are frequently named as defendants in suits alleging constitutional violations, have a keen interest in ensuring that qualified immunity remains the robust defense it was meant to be. The fact that the present petitioner is a federal officer sued under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), whereas suits against state officers for alleged violations of constitutional rights proceed under 42 U.S.C. §1983, is of no moment; this Court has made clear that qualified immunity applies identically in both contexts. *See Harlow v. Fitzgerald*, 457 U.S. 800, 809, 818 n.30 (1982) (citing *Butz v. Ecomomou*, 438 U.S. 478, 504 (1978)).

STATEMENT OF THE CASE

The petition, of course, provides the necessary detail concerning the facts that underlie the present case. Suffice it to say here that petitioner, FBI Special Agent Jake Gregory, had a hand in executing a Florida arrest warrant against respondent Julian Christopher Lee. The dispute here centers on whether respondent or, alternatively, respondent's brother Robert Q. Lee, was, in fact, the target of the Florida warrant. In many respects, the information contained in the warrant fit respondent to a T. For starters, the name listed in the warrant, "Christopher Lee," was indeed the name respondent was using at the time. In addition, "[t]he Social Security number, date of birth, race, and gender listed on the warrant were all exact matches for respondent." Pet. at 3. Finally, whereas the FBI description of respondent's brother reported that he had multiple identifying marks, including several scars and a tattoo, the warrant's "scars

or tattoos" line was blank. *See id.* at 4. On the other hand, it must be acknowledged, two factors pointed, at least at the margins, away from respondent as the subject of the warrant: whereas the warrant listed "Christopher Lee's" height and weight as 6' 1" and 200 pounds, respectively, respondent's driver's license listed him as two inches taller and 70 pounds lighter. *See id.* at 3.

After it was determined that respondent's arrest pursuant to the Florida warrant had been based on mistaken identity (or more accurately, identity theft), all charges against him were dropped. Respondent nonetheless sued Agent Gregory alleging, among other things, a violation of his Fourth Amendment rights. Agent Gregory sought summary judgment on qualified immunity grounds. Both the district court and the Ninth Circuit, however, denied summary judgment on the basis of respondent's "conten[tion]" that – without respect to whether objective facts gave rise to probable cause to arrest – Agent Gregory "actually knew" that respondent was not the person named in the warrant. App. 8a. As to the underlying constitutional claim, the Ninth Circuit held that "[k]nowingly arresting the wrong person pursuant to a facially valid warrant issued for someone else violates rights guaranteed by the Fourth Amendment" and that "Gregory's contention that his actual knowledge should be ignored" in favor of a focus on objective factors was "completely without merit." App. 8a. Likewise, with respect to qualified immunity, the court of appeals held that "[k]nowingly arresting the wrong person is [a] self-evident wrong because an officer cannot have probable cause to believe the person arrested has committed the crime described in a warrant when he knows that the warrant identifies another person." App. 10a.

REASONS FOR GRANTING THE PETITION

Presently at issue is the Ninth Circuit's singular reliance on Agent Gregory's alleged subjective perceptions – his supposed "knowledge" – to defeat qualified immunity. As we will show, the court's reliance on subjective considerations squarely conflicts with (i) well-reasoned decisions of the First Circuit, (ii) this Court's own precedents clarifying that both probable cause and qualified immunity are governed by purely objective criteria, and (iii) the fundamental public policies underlying the qualified immunity doctrine. Furthermore, the question presented is of tremendous practical importance – most of all, perhaps, to the States and their officers. By making every allegation of subjective "knowledge" a basis for dispensing with immunity and an occasion for trial, the Ninth Circuit's decision "punches a gaping hole in the qualified immunity defense." Pet. at 10.

I. The Ninth Circuit's Reliance on Subjective Considerations To Defeat Qualified Immunity Implicates a Clear Circuit Split.

That the question presented implicates a square circuit split – and has engendered confusion more generally – is clear enough. As the petition convincingly demonstrates, the First and Ninth Circuits have now offered diametrically opposite answers to the very same questions. The First Circuit has consistently held that an officer's subjective beliefs are irrelevant to the probable-cause and qualified-immunity inquiries; all that matters for Fourth Amendment purposes is that the information before the officer, viewed objectively, was sufficient to justify the arrest, and, for qualified-immunity purposes, that a reasonable officer could have thought the information sufficient. *See* Pet. at 19-21 (summarizing *Floyd v. Farrell*, 765 F.2d 1 (1st Cir. 1985), and *Brady v. Dill*,

187 F.3d 104 (1st Cir. 1999)). In particular, the First Circuit has taken pains to clarify that there is a difference for probable-cause and qualified-immunity purposes between true, objective "knowledge" – meaning awareness of a fact or event to which one was a "percipient witness" – and "subjective belief." *Brady*, 187 F.3d at 113. The latter, which refers to the inferences an officer draws in his own mind on the basis of his "own evaluation of the facts before him," is categorically off-limits. *Floyd*, 765 F.2d at 6.

In stark contrast, the Ninth Circuit in this case held – wholly without regard to the nature of the objective information in the arresting officer's possession – that because respondent Lee had "contend[ed]" that Agent Gregory "actually knew" that Lee was not the person named in the arrest warrant, and because "[n]o reasonable officer would believe that he is entitled knowingly to arrest the wrong man pursuant to a facially valid warrant the officer knows was issued for someone else," qualified immunity was inappropriate. App. 9a. Before going further, a brief clarification concerning terminology is in order. There is of course no allegation here that Agent Gregory was a first-hand observer of any of the crimes in question; he could not therefore have "actually kn[own]" in the strict sense that Lee was innocent (or guilty, for that matter). Rather, what the Ninth Circuit casually referred to as Agent Gregory's "knowledge" was, in fact, his supposed "subjective belief" that Lee was not his man. That consideration, however labeled, is the very consideration that the First Circuit ruled out of bounds.

The First and Ninth Circuits' approaches – one focusing entirely on objective facts, the other entirely on subjective perceptions – cannot be reconciled.[1]

II. The Ninth Circuit's Reliance on Subjective Considerations To Defeat Qualified Immunity Squarely Conflicts With This Court's Own Precedent.

What seems equally (if not more) clear to amici is that the Ninth Circuit's subjective-perceptions approach to probable cause and qualified immunity is fundamentally inconsistent with this Court's own established precedent. Because the petition convincingly makes the case on both scores, we provide only a thumbnail sketch here.

A. This Court's Decisions Make Clear That Probable Cause Turns on Objective, Rather Than Subjective, Considerations.

The first step in the qualified-immunity analysis, of course, asks whether "the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Ninth Circuit here held that it didn't matter whether Gregory "had probable cause to believe that the person named in the facially valid ... warrant was in fact" Lee; rather, the court said, because Lee had "contend[ed]" – without respect to the objective facts bearing on probable cause – that Agent Gregory "actually knew" (*i.e.*, subjectively believed) that Lee was

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[1] Even beyond the clear circuit split that the Ninth Circuit has created (and is apparently committed to maintaining, *see Henshaw v. Daugherty*, No. 04-15619, 125 Fed. Appx. 175, 2005 WL 756105, at *1 (9th Cir. Apr. 4, 2005) (following *Gregory*)), the lower courts seem genuinely confused about the role, if any, that subjective perceptions play in the probable-cause and qualified-immunity analyses. *See* Pet. at 23-25 (cataloguing conflicting decisions from the Fourth and Sixth Circuits and from several district courts).